75-5384

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1975

****

ERNEST JOHN VINSON,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

****

RESPONSE OF THE STATE OF NORTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

****

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Dated:

INDEX

TABLE OF CASES

INDEX (Continued)

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 287 NC 326 (1975) and is appended to Petitioner's petition.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 USC §1257(3).

QUESTIONS PRESENTED

1. Whether the imposition and carrying out of the sentence of death for the crime of rape under the law of North Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

2. Whether the exclusion for cause of veniremen on the grounds of their expressed attitudes toward the death penalty violated Petitioner's rights under the Sixth or Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

Petitioner, Ernest John Vinson, was tried in the Superior Court of Wilson County, North Carolina, and was found to be guilty of the crime of rape. A sentence of death by asphyxiation of gas was pronounced. Petitioner appealed to the Supreme Court of North Carolina and the judgment was affirmed on the 6th day of June, 1975. Execution of the judgment was stayed in order to give Petitioner an opportunity to file a petition for a Writ of Certiorari in this Court.

Since the facts of this case have been fully stated by the Petitioner, and have been amplified in the opinion of the Supreme Court of North Carolina, they are not restated here.

ARGUMENT

I. THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF RAPE UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

PETITIONER'S QUESTION 1

This question challenges that the imposition of the death penalty for the crime of rape violates the Eighth and Fourteenth Amendments to the Constitution of the United States.

The petitioner asserts that the penalty of death is cruel and unusual punishment for non-injurious rape offenses. He also urges that the procedure through which the death penalty is applied under the law of North Carolina violates the Eighth and Fourteenth Amendments. Petitioner's assertions, in essence, question the propriety of the North Carolina Legislature to prescribe punishment. There is no valid reason for the Court to grant certiorari at this time to hear this question.

This Court granted certiorari to petitioner Jessie Thurman Fowler in the case of Fowler v. North Carolina, No. 73-7031 (Oct. Term, 1974) which, although a murder case, concerns both the issue of the constitutionality of the death penalty and the question as to whether penal policy is more appropriately to be reviewed by the Legislature than by the Judiciary. Extensive briefs were submitted in that case and oral arguments were made before this Court on April 21, 1975. Hence, petitioner's question has, in essence, been

accepted for hearing by the Court, and oral arguments before this Court have already been made. Therefore, any decision in this case should be dependent upon the outcome of the Fowler case, and the petition to grant certiorari should be denied.

II. THE EXCLUSION FOR CAUSE OF VENIREMEN ON THE GROUNDS OF THEIR EXPRESSED ATTITUDES TOWARD THE DEATH PENALTY DID NOT VIOLATE PETITIONER'S RIGHTS UNDER THE SIXTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

PETITIONER'S QUESTION 2

One of the jurors stated that under no circumstances and regardless of the evidence, she would not return a verdict of guilty if it meant the mandatory imposition of the death penalty.

Under North Carolina law, this juror was properly excused for cause. (State v. Monk, 286 N.C. 509, 212 S.E. 2d 125 (1975); State v. Ward, 286 N.C. 304, 210 S.E. 2d 407 (1974); State v. Honeycutt, 285 N.C. 174, 203 S.E. 2d 844 (1974); State v. Crowder, 285 N.C. 42, 203 S.E. 2d 38 (1974). It would appear then that the decision to excuse the juror for cause requires no clarification of North Carolina's law. It would also appear that the North Carolina law on this subject is not in conflict with the law of the Supreme Court of the United States under the case of Witherspoon v. Illinois, 391 US 510, 83 S.Ct. 1770, 20 L.Ed. 2d 776 (1968), and again accordingly, the petitioner has failed to show prejudice and the petition to grant certiorari should be denied.

The case of Witherspoon v. Illinois, supra, establishes two things: (1) veniremen may not be challenged for cause simply because they voice general objections to the death penalty or express conscientious or religious scruples against its infliction; and (2) veniremen who are unwilling to consider all of the penalties provided by law and who are irrefutably committed before the trial has begun, to vote against the death penalty regardless of the facts and circumstances that might emerge during the course of the trial, may be challenged for cause on that ground. In Witherspoon at 518, this Court said:

> "The only justification the State has offered for the jury-selection technique it employed here is that individuals who express serious reservations about capital punishment cannot be relied upon to vote for it even when the laws of the State and the instructions of the trial judge would make death a proper penalty. But in Illinois, as in other states, the jury is given broad discretion to decide whether or not death is 'the proper penalty' in a given case, and a juror's general views about capital punishment play an inevitable role in such decision."

This language from Witherspoon reflects an important ground of the reasoning in that case . . . a line of argument that is no longer applicable in North Carolina following the decisions of this Court in Furman v. Georgia, 408 US 238 (1972) and the Supreme Court of North Carolina in State v. Waddell, 282 NC 431, 194 SE 2d 19 (1973). North Carolina jurors no longer decide whether death is "the proper penalty", for the law now requires that the penalty of death be adjudged for the enumerated crimes.

While petitioner's argument that "identifiable segments of the community (cannot be systematically excluded from jury panels)" correctly states the law, that proposition is not exactly in keeping with the principles stated by this Court in Witherspoon.

> ". . . nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear: (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Witherspoon v. Illinois, supra., footnote 21 at p. 522.

Such veniremen as were excluded, although they may constitute an identifiable segment of the community, have no place on a jury, the sole function of which is find guilt or innocence. Their views respecting the propriety of the death penalty are a mere irrelevancy where the penalty is set by the law, and the jury has no discretion to set the penalty.

The right guaranteed by the Sixth Amendment is a right to a trial by an impartial jury; and it is this right which applies to the State by the due process clause of the Fourteenth Amendment. Duncan v. Louisiana, 391 US 145, L.Ed. 2d 491. Except where racial exclusion is involved, an impartial jury means only a neutral one. Fay v. New York, 332 US 261, 91 L.Ed. 2043. Only juries which are prejudiced, Shepherd v. Maxwell, 384 US 333, 16 L.Ed. 2d 600; Witherspoon v. Illinois, 391 US 510, 20 L.Ed. 2d 776, or partially or mentally incompetent, U.S. ex rel Leguillou v. Davis, 115 F. Supp. 392 (D.C. vi 1953) do not meet this standard. The "broad cross-section" or "truly representative cross-section" requirements appearing in many Federal cases are not constitutionally mandated, Salisbury v. Grimes, 406 F. 2d 50, (5th Cir. 1969); Christian v. Maine, 404 F. 2d 205 (1st Cir. 1968); and in order

to fulfill constitutional requirements the States are only required to utilize a cross-section suitable in character and intelligence. Brown v. Allen, 344 US 443, 97 L.Ed. 469. Under Witherspoon then, a venireman should be willing to consider all the penalties which are provided by State law and he should not be irreparably committed before the trial has begun to vote against the death penalty regardless of any circumstances and facts which might be later introduced into evidence. Accord Boulden v. Holman, 394 US 478, 22 L.Ed. 2d 433, 89 S.Ct. 1138 (1969).

CONCLUSION

It is therefore respectfully submitted that the question concerning the constitutionality of the death penalty as applied under the law of North Carolina is already before this Court; that there is not evidence that the petitioner was deprived of any constitutional right by the fact that the trial judge properly excused a juror for cause upon her statement that under no circumstances would she regard the evidence which invoked a mandatory penalty of death where the punishment is mandatory. The Petition for Writ of Certiorari to the Supreme Court of North Carolina should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Response of the State of North Carolina to Petition for Writ of Certiorari to the Supreme Court of North Carolina on petitioner by depositing the same in the United States mail to:

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This the ____ day of September, 1975.

Charles M. Hensey